

## THIS BRIEF OVERVIEW IS REALLY JUST THE TIP OF THE REFORM ICEBERG - - -

### MEANS TESTING (§ 102)

Through an extensive revision to 11 U.S.C. § 707(b), the means testing mechanism presumes abuse in chapter 7 cases if, after subjecting a petition to financial analysis, it is determined that the debtor could repay a threshold level of general unsecured debt. This computation is based in large part on two elements: 1) the debtor's current monthly income (generally, income from all sources, including contributions by others to household expenses but excluding Social Security benefits); and 2) allowed deductions, utilizing an IRS standard for expenses, as well as several other highly detailed expense standards. **The clerk must send a notice to all creditors within 10 days of the filing of the petition if the debtor is an individual and the presumption of abuse arises under § 707(b).** Thus, the clerk's office has a duty to review the information submitted by the debtor and send a notice if the presumption of abuse arises.

A presumption of abuse arises if the debtor's income minus expenses multiplied by 60 is greater than the lesser of : 1) 25% of the debtor's unsecured claims or \$6,000, whichever is greater, or 2) \$10,000. The debtor may rebut this presumption only by demonstrating special circumstances (itemized and supported by documentation) that would decrease income or increase expenses in an amount which would bring the debtor below the monetary standard for a presumption of abuse. An additional requirement imposed by this section requires the debtor to include the calculations that determine whether a presumption of abuse arises under this section. A new form likely will be created to be submitted with the petition.

**Under the revised procedures, the U.S. Trustee or Bankruptcy Administrator (BA) must review all materials filed by the debtor and not later than 10 days after the meeting of creditors, file with the court a statement indicating whether the case would presumed to be an abuse under § 707(b).** Not later than 5 days after the filing of such statement by the trustee or BA, the court shall provide a copy of the statement to all creditors. The U.S. Trustee or BA has 30 days from the filing of the statement to either move to dismiss or convert (in lieu of dismissal, the case may be converted to a chapter 13 case, with the debtor's consent) or to file a statement explaining why dismissal or conversion would not be appropriate.

## NOTICE OF ALTERNATIVES (§ 104)

This section would amend 11 U.S.C. § 342 by requiring additional information in the notice currently provided to debtors prior to commencement of a case. **The additional information relates to types of services available from credit counseling services and also contains a statement regarding penalties for fraud or perjury in committed in connection with the filing of bankruptcy.**

## CREDIT COUNSELING/FINANCIAL MANAGEMENT COURSE (§ 106)

**In a two-tiered requirement**, both initial filing and grant of discharge would be conditioned on credit counseling. In order to be eligible for filing under any chapter, a **debtor must participate in an individual or group briefing conducted by an approved, nonprofit budget/credit counseling service in the 180-day period preceding the filing of bankruptcy**. The mandatory briefing must describe opportunities for credit counseling and include a related budget analysis.<sup>2</sup> There are two exceptions to this provision: 1) for debtors who reside in judicial districts for which the UST/BA has determined that such services are not readily available; and 2) for debtors who can demonstrate exigent circumstances that warrant a waiver. Debtors granted waivers are given 30 days from filing to meet the requirements.

**The second requirement is that debtors complete an approved instructional course in financial management prior to the granting of a discharge**. As with the prepetition counseling requirements, this requirement is waived for debtors who live in judicial districts for which the UST/BA has determined that such services are not readily available.

## AUTOMATIC STAY AND LEASES (§ 311)

**This section adds exceptions regarding leases to current automatic stay provisions**, as well as limitations to these new exceptions and remedial actions available to the debtor. In general terms, the new exceptions to the automatic stay apply:

- **to any eviction or similar proceeding against a debtor tenant if the lessor (i.e., the landlord) has obtained a judgment for possession of the leasehold**

**prior to the date of the filing of the petition; and**

- **to a pending eviction action based on endangerment of the property or use of illegal drugs on the property**, if the lessor files with the court a certification that an eviction has been filed or that the tenant has endangered the property or used illegal drugs on the property during the 30-day period preceding the filing of the certification.

The first exception to the automatic stay (which will be codified at 11 U.S.C. § 362(b)(22)), becomes effective 30 days after the filing of the petition, unless:

- the debtor files with the petition and serves on the lessor a certification that the debtor would be permitted to cure, under applicable non-bankruptcy law (i.e., state landlord-tenant law), the entire monetary default which gave rise to the judgment for possession; and
- **the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition; and**
- the debtor (or an adult dependent of the debtor), within the 30-day period following the filing of the petition, files with the court and serves on the lessor a further certification that the debtor has cured, under applicable nonbankruptcy law, the entire default at issue.

The proposed subsections also contain provisions for hearings on the sufficiency of the required certifications by the debtor and add additional notice requirements for the clerk, including sending certified copies of the docket to the parties in particular cases.

## **NEW NOTICE REQUIREMENTS/FILING OF TAX RETURNS (§ 315)**

### **Notice Requirements**

This section is intended to strengthen the notice provisions in 11 U.S.C. § 342 to ensure that creditors receive, at the address they specify, all required notices. **1.) The changes to Section 342(e) provide that a creditor may file with the court and serve on the debtor a notice of the address that must thereafter be used to give notice to the creditor in that case.** The court and debtor must use that address beginning five days after they receive the creditor's notice. If a creditor provides an address under this provision and debtor fails to utilize this address for a subsequent notice, no sanctions may be awarded for conduct that would otherwise be violative of the automatic stay.

**2.) In addition, under § 342(f), creditors may file an address with a court which will then be used for all notices sent by any court in future cases.**

### **Tax Returns**

**This section also expands the documents a debtor must file as required by 11 U.S.C. § 521. The debtor must file with the trustee a copy of debtor's most recently filed tax return for the year immediately prior to the filing of the bankruptcy petition. Upon request of the court, U.S. Trustee, or any party in interest, the debtor must file with the court copies of any tax returns filed during the pendency of the bankruptcy case. The tax returns filed with the court must be maintained in accordance with procedures established by the Director of the Administrative Office to ensure their confidentiality and shall be made available only to the U.S. Trustee, bankruptcy administrators, trustees, and any party in interest.**

## **DISMISSAL FOR FAILURE TO TIMELY FILE SCHEDULES OR PROVIDE REQUIRED INFORMATION. (§ 316)**

**This section mandates that a bankruptcy filing be automatically dismissed if the debtor fails to file all information required by 11 U.S.C. § 521 within 45 days after the filing of the petition.**

## **UNITED STATES TRUSTEE PROGRAM FILING FEE INCREASE. (§ 325)**

This section as currently written, would become effective on October 17, 2005, and would change the filing fees as follows: **for a Chapter 7 - \$200**, for a **Chapter 13 - \$150**, for a **Chapter 11 - \$1,000**. This section would also change how the fees are apportioned between the U.S. Trustee program and the judiciary and would restrict the use of a portion of the funds distributed to the judiciary. Additional changes to fees and allocations are likely to be included in a supplemental Appropriations bill pending in Congress. Further information on these likely changes will be provided by separate memorandum.

These sums are misleading in that they may not be the full filing fee particularly in Chapter 7 and Chapter 13 cases. It is suffice for now to know that the fee structure will be changing - again.

## **EXTENDED TIME BETWEEN DISCHARGES § 312**

Section 727(a)(8) is amended to subject a Chapter 7 debtor to denial of discharge if the debtor received a Chapter 7 or 11 discharge in a case filed **within 8 years** of the filing of the pending case.

Section 1328 is amended to include a new subsection (f) providing that a Chapter 13 debtor will be denied discharge if the debtor received a discharge (1) “in a case filed under Chapter 7, 11, or 12 . . . during the **4-year** period preceding the date of the order for relief” in the pending case, or (2) “in a case filed under Chapter 13 . . . during the **2-year** period preceding the date of such order.”

## **IN FORMA PAUPERIS (§ 418)**

**This section permits *in forma pauperis* filings in courts, i.e., debtors can be allowed to file petitions without paying a filing fee and other fees if they can demonstrate that their income is less than 150% of the official poverty line determined by the Office of Management and Budget.**

## **IMPROVED BANKRUPTCY STATISTICS. (§ 601)**

**The clerk of each district will be required to compile extensive statistics regarding individual consumer debtors in chapters 7, 11, and 13 cases, which data will be forwarded to the AO for inclusion in an annual report to Congress.** These statistics include such items as: (1) total assets and liabilities of debtors and each category of assets and liabilities; (2) current monthly income and average income and expenses of those debtors; (3) aggregate amount of debt discharged in each case (difference between total amount of debt reported and amount of debt reported nondischargeable); (4) average period of time between the filing and closing of the case; (5) number of cases in which a reaffirmation was filed; (6) the total number of reaffirmations filed; (7) the number of reaffirmations filed in which the debtor was not represented by counsel; (8) of those cases, the number of reaffirmations approved by the court; (9) in chapter 13 cases - (a) the number of cases in which a final order was entered determining the value of property securing a claim in an amount less than the amount of the claim; (b) the number of final

orders determining the value of property securing a claim; (c) the number of cases dismissed, the number of cases dismissed for failure to make payments under the plan, the number of cases refiled after dismissal, and the number of cases in which the plan was completed, separately itemized with respect to the number of modifications made before the completion of the plan; (10) the number of cases in which the debtor filed another case within the previous 6 years; (11) the number of cases in which the creditors were fined for misconduct and any amount of punitive damages awarded by the court; and (12) the number of cases in which sanctions under rule 9011 were imposed and damages awarded.

This provision has a **different effective date from the rest of the bill - collection of data is to begin 18 months after enactment of the bill** and the first report to Congress is due July, 2008.

## **BANKRUPTCY APPEALS**

Section 158 of the Judiciary Code (Title 28, U.S.C.) is amended to provide the circuit courts of appeal with discretion to accept bankruptcy appeals without an intermediate appellate decision. **The circuit court may accept a direct appeal** if the bankruptcy court, the district court, the Bankruptcy Appellate Panel, or the parties to the appeal acting jointly certify that direct appeal is necessary to resolve a matter of first impression, conflicting decisions, or public importance, or a matter that would materially advance the progress of the case.



## **SANCTIONS IMPOSED ON DEBTOR'S COUNSEL § 102(a)(2)**



Section 707(b) is amended to add several new duties and liabilities of debtors' counsel:

- Subparagraph (4)(A) allows the court to award costs and fees to a trustee who successfully pursues a § 707(b) motion, payable by debtor's counsel, if it finds that the Chapter 7 filing **violated Fed. R. Bankr. P. 9011**.
- Subparagraph (4)(B) specifies that if the court finds any violation of Rule 9011 by the debtor's attorney, it may award a civil penalty against the attorney, payable to the trustee, U.S. trustee, or bankruptcy administrator. Pursuant to § 103(b) of the Code, this provision would apply only in Chapter 7 cases.
- Subparagraphs (4)(C) and (D) set out a statutory parallel to Fed. R. Civ. P. 11, providing that the signature of a debtor's attorney constitutes a certification that the attorney has "performed a reasonable investigation" and determined that the signed documents is well grounded in fact, that any Chapter 7 petition is not an abuse under § 707(b), and that the attorney has no knowledge after an inquiry that the information in the schedules filed with [the] petition is incorrect." This statutory restatement of Rule 11 includes no provision for sanctions in the event that its signature certification is incorrect.
- **S. 256 §§ 227-29**

Under new § 526, debtors' counsel are subject to loss of fees, damages, injunctive remedies, and imposition of costs for any failure to meet new disclosure and record-keeping requirements imposed on "debt relief agencies" in new §§ 527 and 528. "Debt relief agency" is defined in new § 101(12A) as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration." "Assisted person" is defined in new § 101(3) as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000." Accordingly, bankruptcy lawyers who represent only nonpaying debtors or owners of businesses and other relatively wealthy individuals would not be covered. Among the new provisions are an obligation to include specified statements in advertisements (§

528) and an obligation to retain for two years a copy of each of several notices required to be given to any “assisted person” (§ 527).

• **S. 256 § 319**

A sense of Congress is set out, stating that Fed. R. Bankr. P. 9011 should be amended to include a requirement that all documents submitted by a debtor either to the court or a trustee, specifically including schedules, be subject to a reasonable inquiry by the debtor or the debtor’s counsel to verify that the document is well grounded in fact and warranted by law. Such an amendment would increase the liability for debtor’s attorneys under the terms of new § 707(b)(4)(A) and (B), described above, which are based on violations of Rule 9011.

**LOTS OF NEW STUFF ON REAFF’S AND REDEMPTIONS**